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(2)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 542

N. S. HOUSMAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT.

EARL WARREN,
Attorney General of the State of California,
DAVID K. LENER,
Deputy Attorney General of the State of California,
600 State Building, San Francisco, California,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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BRIEF FOR RESPONDENT.

STATEMENT OF CASE.

The statement of the case set forth by petitioner in his petition is fairly accurate. Some further detail, however, may be essential to bring to this Court a clearer conception of the issues presented. In line with the suggestion of petitioner, the Municipal Court complaints No. 425,409 and No. 425,410 will be hereafter referred to as the "first Municipal Court trial", while the Municipal Court case No. 425,187 will be hereafter

(NOTE): Unless otherwise indicated, all italics are by the writer.

referred to as the "second Municipal Court trial" as will the alleged narcotic records of petitioner involved herein be referred to as the "Black card" and the "Brandon card".

The first Municipal Court trial involved two narcotic prescriptions. Complaint No. 425,409 alleged the failure of petitioner to keep a record of a narcotic prescription issued to A. E. Black on the 23rd day of July, 1939, in accordance with Section 1-d of the California Narcotic Act. (California Statutes of 1933, pages 781, 784.) Complaint No. 425,410 alleged the failure of petitioner to keep a record of a narcotic prescription issued to A. R. Brandon on August 16, 1939 in violation of said section of the California Narcotic Act. These causes were consolidated for trial.

To rebut the evidence introduced in support of the offenses set forth in the first Municipal Court trial petitioner introduced the Black card and the Brandon card upon which entries of these prescriptions appeared with numerous others, as photolithographic copies of these cards attached to the indictment returned in the instant case will show. (R. 8A, 14A.)

In the trial of the first Municipal Court case petitioner took the stand and testified that the entries on the Black and Brandon cards, including those set forth in the complaint, were entered by him at or about the time they bear date. Neither of the prescriptions described in the complaints in the first Municipal Court trial are contained in the thirty counts of the complaint filed in the second Municipal Court trial, nor do the twenty-five of the thirty narcotic prescriptions

set forth in the complaint in the second Municipal Court trial, issued to Black and Brandon, exhaust the narcotic prescriptions set forth on the Black and Brandon cards. During the second Municipal Court trial petitioner again introduced in the evidence the Black and Brandon cards and again testified the entries made on said cards were made at or about the time they bear date. Petitioner was acquitted on both charges in the first Municipal Court trial and on all but three of the thirty counts involved in the second Municipal Court trial. The convictions returned by the jury in that case did not involve any of the narcotic prescriptions issued to Black or Brandon appearing on said cards. On November 9, 1939 the indictment for perjury, the offering of false evidence and the preparing of false evidence, in the instant case, was filed, based upon the testimony of the petitioner in the first Municipal Court trial.

It is contended by petitioner that the verity of the Black and Brandon cards was placed directly in issue in the second Municipal Court trial and that the verdicts of acquittal by the jury on the charges in the complaint involving the Black and Brandon narcotic prescriptions constituted a finding by the jury that the Black and Brandon cards were not false, fabricated or antedated and that the doctrine of *res judicata* as embodied in sections 1908 and 1911 of the California Code of Civil Procedure, and under the general rule of law, applied to criminal cases, including the offense of perjury.

The California Narcotic Act, under which the Municipal Court complaints were filed, was clarified and

codified without substantial change in the California Health and Safety Code. The compiling of this code was a part of a general plan on the part of the legislature to clarify and codify the laws of the State. As instances of the fulfillment of this legislative plan, we have among others, the Business and Professions Code, Insurance Code, Labor Code, Political Code, Civil Code and Code of Civil Procedure, all containing similar saving clauses with that under consideration herein. (See *Sobey v. Malony*, 40 Cal. (2nd) 381, 386.)

Section 1-d of the California Narcotic Act, as amended in 1933, and prior to its reenactment and codification in the Health and Safety Code, reads as follows:

> "Every person authorized by law to issue a prescription or administer or dispense narcotic drugs as mentioned in this act shall preserve for a period of not less than two years a record of the name and address of the person to whom, the date when, the character and quantity of the drug prescribed, or administered or dispensed, and the purpose for which each prescription was issued, or narcotic drug administered or prescribed or dispensed. Such record shall be open at all times to inspection by the inspectors of the Division of Narcotic Enforcement. In any prosecution under this act proof that the defendant had in his possession at any time a greater amount of drugs than accounted for by the record required in this act shall constitute prima facie evidence of guilt."
>
> (Statutes of California, 1933, Section 1-d, p. 784; Deering's General Laws, Act 5323, Section 1-d, p. 2604.)

This section, as reenacted and codified in the Health and Safety Code, was split up into two sections which provide:

> "Sec. 11225. Every person who isues a prescription, or administers or dispenses a narcotic shall make a record that, as to the transaction, shows all of the following:
>
> (a) The name and address of the patient.
>
> (b) The date.
>
> (c) The character and quantity of narcotics involved.
>
> (d) The pathology and purpose for which the prescription is issued, or the narcotic administered, prescribed, or dispensed."
>
> "Sec. 11226. The record shall be preserved for two years and shall at all times be open to inspection by inspectors of the State division and inspectors of the Board of Pharmacy.
>
> Every person who violates any provision of this section is guilty of a misdemeanor."
>
> (California Statutes of 1939, page 761.)

Section 4 of the Health and Safety Code is the saving clause assailed by petitoiner. It reads:

> "Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to the provisions of this code as far as possible."
>
> (California Statutes of 1939, page 483.)

While section 2 of said Code provides:

> "The provisions of this code in so far as they are substantially the same as existing statutory

provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments."

(California Statutes of 1939, page 483.)

In order to ascertain the intention of the legislature, section 2 and section 4 of said Health and Safety Code must be read together. Section 2 is simply a reaffirmation of the general rule of statutory construction to the effect that when an existing statute is reenacted without substantial change it is the intention of the legislature to continue the old statute in full force and effect without interruption.

Petitioner contends the saving clause as evidenced by section 4 of the Health and Safety Code failed to save for prosecution offenses against said section 1-d of the Narcotic Act where no accusation had been filed prior to its alleged repeal, hence it was unconstitutional and ineffective against petitioner in the instant case.

JURISDICTIONAL GROUNDS ASSIGNED.

The grounds upon which petitioner seeks to invoke the jurisdiction of this Court are substantially as follows:

(a) That the refusal of the State court to apply the doctrine of *res judicata* in the instant perjury case constituted an invasion of the rights of petitioner guaranteed under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution.

(b) That the State court's holding that section 4 of the Health and Safety Code was valid as a saving clause for the prosecution of actions pending under section 1-d of the State Narcotic Act, after its repeal, constituted a violation of the "due process" and "equal protection" clauses of the Fourteenth Amendment in that section 4 imposes an unreasonable and arbitrary classification by granting immunity to those against whom no accusation had been filed for violations of said section 1-d of the Narcotic Act; that the State court failed to pass upon this constitutional question.

It is the contention of respondent that neither the application of the doctrine of *res judicata* nor the construction placed upon the saving clause in question by the State Appellate Court presents a federal question under and by force of which this Court may acquire jurisdiction; that the decision of the State Appellate Court is not subject to review by this Court because the decision is based upon the application of the local common law, or statutes which restate the common law, which does not involve a federal statute nor the federal Constitution.

ARGUMENT.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THE PETITION OF THE PETITIONER, HENCE THIS COURT HAS NO JURISDICTION TO REVIEW THE DECISION OF THE STATE APPELLATE COURT.

(a) THE DOCTRINE OF RES JUDICATA, BY THE GREAT WEIGHT OF AUTHORITY, HAS NO APPLICATION TO PERJURY CASES.

The great weight of authority holds that an acquittal of a defendant charged with the commission of a criminal offense is no bar to his subsequent prosecution for perjury, for falsely testifying at the former trial, by which he secured, or aided in securing, his acquittal, although his conviction on the perjury charge would necessarily be inconsistent with the verdict of acquittal in the former trial. In taking this view, the State Appellate Court in the instant case but followed the weight of common law authority and which appeared to be the best reasoned, the most logical and one which comports with our views of the administration of justice. The State Appellate Court in this connection quoted with approval from the leading cases of *People v. Niles* (Ill.), 133 N.E. 352, and *Jay v. State* (Ala.), 37 So. 137, as follows:

> "Though there is some conflict in the authorities upon the question of whether the doctrine of *res judicata* applies in a criminal proceeding of this nature the great weight of authority is that it has no application. One of the leading cases adopting the majority view is People v. Niles, 300 Ill. 458 (133 N.E. 252, 37 A. L. R. 1284). In that case the appellant had been indicted jointly with another for the larceny of and receiving as stolen property an automobile. The codefendant pleaded guilty and upon his favorable testimony and that

of the appellant the latter was found not guilty. Thereafter he was indicted for perjury because of the testimony so given. On appeal the Supreme Court of Illinois said that the question presented for decision was: 'Can a person acquitted by a jury of an offense of which he denied his guilt as a witness in his own behalf be afterwards prosecuted for perjury predicated upon testimony given by him upon the former trial, where a conviction of the charge of perjury necessarily imports a contradiction of the verdict of not guilty in the former trial?' In answering the question in the affirmative the court said: 'Justice cannot be administered through a system of courts unless there can be some assurance that the finding of the court is based upon testimony truthfully given. Any rule which tends to encourage the giving of false testimony threatens the peaceable and commendable settlement of controversies by the courts. The general proposition that one can escape punishment for perjury because he succeeded in inducing a jury to credit his false testimony is supported neither by authority nor by reason. If he could, then it follows that the law encourages parties—particularly defendants in criminal cases—to perjure themselves. We must declare that the law is guilty of no such folly. An accused's immunity from punishment for crime must not be made to depend upon the accomplishment of his acquittal in one prosecution by committing the crime for which he claims immunity. It is furthermore the policy of the law that judicial proceedings and judgments shall be fair and free from fraud, and that litigants and parties be encouraged, when sworn as witnesses, to tell the truth, and that they be punished if they do not. The

authorities seem now to be unanimous in holding that an acquittal of one charged with crime is no bar to a prosecution for perjury for false testimony given by him at the trial. (Citing numerous cases.)'

In *Jay v. State,* 15 Ala. App. 255 (37 So. 137, 139), the Alabama court clearly states the reason for the majority rule in the following language: 'The doctrine of *res judicata* springs out of and is founded upon the principle of estoppel. It rests upon the principle of public policy that there should be an end to litigation—the maxim is, "*Interest reipublicae ut sit finis litium.*" Keeping in view the basic principle and underlying reason—public policy—it is obvious that while public policy on the one hand demands an end of litigation, and hence puts forward the doctrine of *res judicata,* yet, on the other, it is manifest that every interest of public policy demands that perjury be not shielded by artificial refinements and narrow technicalities, for perjury strikes at the very administration of the law and holds the courts up to contempt if they allow the perjurer to go unwhipt of justice. In other words, while public policy on the one hand creates the doctrine of *res judicata,* it also, on the other, requires that perjurers be brought to trial. It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury; this would be putting a premium upon perjury and allowing a scoundrel to take advantage of his own wrong. Public policy does not quaranty immunity to criminals, and that is just what we are asked to do in extending the doctrine of *res judicata* to perjury.'

It would serve no purpose to cite further cases in support of the majority rule or to attempt to analyze those cited by appellant from the minority. Reference may be had to 37 A.L.R. 1290 et seq., 15 Am. Jur., p. 45."

(*People v. Housman,* 44 A.C.A. 687, 691; R. 87, 94.)

In *State v. Bissell* (Vt.), 170 Atl. 102, at page 106, the Court said:

"The courts are now almost unanimous in holding that an acquittal of one charged with crime is no bar to any perjury committed at the former trial. Note, 37 A. L. R. 1290. And it has been held that the same rule applies *although a conviction would necessarily import a contradiction of the verdict in the former case.* People v. Niles, 300 Ill. 458, 133 N.E. 252, 37 A. L. R. 1284."

See also:

State v. Archuleta (N. M.), 217 Pac. 619, 37 A. L. R. 1292;
State v. Vandemark (Conn.), 58 Atl. 715;
State v. Bingham (Kan.), 257 Pac. 951;
State v. Sargood (Vt.), 68 Atl. 49;
State v. Williams (Kan.), 58 Pac. 476;
Yarbrough v. State (Fla.), 83 So. 873;
State v. Tedder (Mo.), 242 S.W. 889;
Miles v. State (Tex.), 165 S.W. 567;
Hutcheson v. State (Tex.), 24 S.W. 908;
Murff v. State (Tex.), 172 S.W. 238;
State v. Cary (Ind.), 65 N.E. 527;
Teague v. Commonwealth (Ky.), 189 S.W. 908.

(b) THERE IS NO IDENTITY OF ISSUES IN THE SECOND MUNICIPAL COURT TRIAL AND THE CASE AT BAR.

It is argued that the acquittal of petitioner in the second Municipal Court trial was a finding by the jury that the Black and Brandon cards were not false, fabricated or antedated.

If this contention be sound, then the objection of petitioner should be that he is being placed twice in jeopardy, the only constitutional safeguard open to him. However, neither the rule of twice in jeopardy nor the doctrine of *res judicata* are available to him since the offenses charged and issued presented are not the same. In the second Municipal Court trial the issue was whether petitioner kept a record of his narcotic prescriptions, alleged in the complaint as required by the California Narcotic Act, while in the case at bar the issue was whether he gave false testimony in testifying the entries on the cards were made at or about the time they bear date. The proof of each offense requires a different character and quantum of evidence. Circumstantial evidence alone is sufficient to convict as to the offenses in violation of the California Narcotic Act, while to prove perjury it requires direct evidence such as the testimony of two witnesses, or one witness and corroborating circumstances. See *California Penal Code,* section 1103a. In this connection, the State court in the instant case said at page 690: (R. 89)

> "The appellant contends that the issue of the verity of the records was adjudicated in the former municipal court trial and that the state is therefore estopped from prosecution under the charges in the indictment. The respondent replies

that the charges there made related to the defendant's failure to keep records required by the State Narcotic Act, and that in finding the defendant not guilty of those charges it was not necessary for the jury to pass upon the truth or falsity of his testimony; that the jury may have disbelieved the testimony of the narcotic officers and may have acquitted the defendant for that reason; that it may have believed that the defendant was unjustly prosecuted because of the pending civil litigation involving the same subject matter. The theory that when a jury acquits a defendant in a criminal proceeding it thereby finds to be true the testimony of all witnesses called upon his behalf is not supported by reason or the common knowledge of mankind."

Again, on page 692: (R. 91)

"For the reason that the judgments in the second municipal court trial were not prior adjudications of the issues here involved the trial court did not err in denying appellant's motion to exclude all evidence relating to the verity of the cards or case records nor in refusing to strike such evidence from the record, and no error occurred in the rejection of appellant's offer in evidence of the judgment roll, transcript of testimony, or the court instructions to the jury in the two municipal court trials since all these documents were offered solely in support of appellant's plea of *res judicata* which was not sound. Appellant does not contend that any matter thus offered and rejected was material to any other item of his defense or that except as to his plea of *res judicata* he suffered any prejudice through the order rejecting his offer."

In *People v. Hardy* (Colo.), 174 Pac. 1117, it was held:

> "The question is this: Does the verdict in favor of the defendant conclusively establish that the testimony of defendant on the trial for forgery is true, and so bar further inquiry on that point? While the cases on the question are somewhat in conflict, we think the great weight of authority and by far the better reasoning answer the question in the negative. *The plea shows that there was evidence offered on behalf of defendant other than his testimony, and that being so, it cannot be said that all his testimony was determined to be true. Again the issue is not the same. In the one case it was: Did he commit such acts as amount to forgery in law? In the other it is: Did he wilfully testify falsely to a material fact?*"

See

State v. Bevill (Kans.), 100 Pac. 476;
State v. Archuleta, supra.

In *Yarbrough v. State* (Fla.), 83 So. 873, at page 874, it was said:

> "The crimes of larceny and perjury are separate and distinct offenses, and in acquitting plaintiff in error upon the charge of larceny the jury did not and could not also acquit him of any perjury which he may have committed in giving evidence in the case in defense of the larceny charge upon which he was on trial."

If the contention of the petitioner may be supported on the theory advanced by him, then the same argument with equal force and reason may be advanced in all cases where a charge of perjury is based upon the

false testimony of the defendant in a prior case in which he was acquitted. Indeed, this spurious defense has been advanced in the foregoing cases in which the Court refused to apply the doctrine.

(c) THE REFUSAL OF THE STATE COURT TO APPLY THE DOCTRINE OF RES JUDICATA VIOLATED NO FEDERAL CONSTITUTIONAL GUARANTEE.

The doctrine of *res judicata* rests upon the two maxims that "a man should not be twice vexed for the same cause" and that "it is for the public good there be an end of litigation".

Gill v. Peppin, 41 Cal. App. 487, 490.

It is simply a rule of public policy subject to the maxim of law that when the reason for the rule ceases, the rule itself ceases to exist. In this connection it was said in *Jay v. State* (Ala.), 73 So. 137, at page 139:

> "* * * In other words, while public policy, on the one hand, creates the doctrine of res judicata, it also, on the other, requires that perjurers be brought to trial. It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury; this would be putting a premium upon perjury and allowing a scoundrel to take advantage of his own wrong. Public policy does not guarantee immunity to criminals, and that is just what we are asked to do in extending the doctrine of res judicata to perjury. *It is a maxim of the law that when the reason ceases the law ceases,—'cessante ratione legis, cessat et ipsa lex.'*"

The doctrine has no application even in civil cases where a judgment has been secured through fraud. Thus, in *Edmonds v. Glenn-Colusa Irr. Dist.*, 217 Cal. 436, on page 439:

> "The doctrine of *res judicata* is stated in a very carefully considered definition in 15 Ruling Case Law, pages 950, 951, in the following language:
>
> 'Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits, *and without fraud or collusion,* by a court of competent jurisdiction, upon a matter within its jurisdiction, is conclusive of the rights of the parties or their privies, in all other actions or suits in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue in the first suit.' * * *"

Indeed, in California the doctrine in criminal cases, other than those in which the charge is perjury, has received a limited application. In this regard in *People v. Ashrawy,* 130 Cal. App. 145, at pages 149 and 150, it was said:

> "While it is true in regard to a judgment in a civil action that it 'is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense' (Estate of Bell, 153 Cal. 331, 340 (95 Pac. 372, 376)), we do not think the rule applies to the same extent in a criminal action. *We think the rule there should be limited to matters actually submitted*

to the jury for its determination; otherwise we would, as in the instant case, bind the state, by successful subornation of perjury, where the same issue might have been but was not presented to the jury because of such criminal act. Such a conclusion is unthinkable under the facts of the two cases here involved."

It thus appears from this case that the issue of perjury must be directly submitted to the jury in order to apply the doctrine.

Section 1908 of the Code of Civil Procedure to which petitioner refers as embodying the doctrine of *res judicata,* is merely declaratory of the common law.

Atchison T. & S. F. Ry. Co. v. Nelson, 220 Fed. 53, 55;

Bartlett Hayward Co. v. Ind. Acc. Comm., 203 Cal. 522, 535.

Sections 1908 and 1911 of the Code of Civil Procedure involve civil law. At least no authorities have been cited by petitioner to the contrary. If they may be deemed applicable to criminal law, they contain no provision against the limitation imposed by the State court and of course whatever limitation is imposed involves a question of construction which is binding upon this Court.

From the foregoing it would clearly appear that the application of the doctrine presents no federal question. On the contrary it involves simply the application of a rule of common law locally applied which is recognized and adopted by the great weight of authority throughout the States of the Union. It re-

quires neither reason nor authority to point out under the circumstances the soundness of the rule applied by the State court. We have yet to learn in what manner and to what extent petitioner is denied the equal protection of the laws or due process of law under the Fourteenth Amendment in the Court's refusal to apply the doctrine in the instant case.

In *Whitney v. California,* 274 U. S. 357, at page 360, it was said:

> "It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. *Crowell v. Randell,* 10 Pet. 368, 392; *Railroad Co. v. Rock,* 4 Wall. 177, 180; *California Powder Works v. Davis,* 151 U.S. 389, 393; *Cincinnati, etc. Railway v. Slade,* 216 U.S. 78, 83; *Hiawassee Power Co. v. Carolina-Tenn. Co.,* 252 U.S. 341, 343; *New York v. Kleinert,* 268 U.S. 646, 650."

Again, in *Honeyman v. Hanan,* 300 U.S. 14, at page 18, it was said:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. *Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54, and cases

there cited. Whether these requirements have been met is itself a federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record. * * *"

See also:

Erie R.R. v. Tompkins, 304 U.S. 64;
Palmer v. Ohio, 248 U.S. 32, 34;
McCoy v. Shaw, 277 U.S. 302, 303.

(d) THE SAVING CLAUSE CONTAINED IN THE CALIFORNIA HEALTH AND SAFETY CODE AS APPLIED BY THE STATE COURT INVOLVED NO CONSTITUTIONAL GUARANTEE.

It is argued by petitioner that section 1-d of the California Narcotic Act was repealed on September 19, 1939 and that upon said day all violations thereunder ceased to be the subject of prosecution thereafter, in the absence of a valid saving clause. He points out the perjury charge is based upon the first Municipal Court trial, the trial of which did not start until after September 19, 1939, the effective date of said repeal, and that said saving clause violates the equal protection of law clause of the Fourteenth Amendment, since the right of prosecution was reserved therein only against those against whom an accusation had been filed prior to said repeal; that it grants immunity to those who violated the Narcotic Act before repeal but against whom no accusation had been filed prior to said repeal. The State Appellate

Court in the case at bar answered this contention as follows:

> "The appellant next complains that because of the repeal of the State Narcotic Act effective September 19, 1939, his trial in the municipal court occurring after that date was a nullity and that he could not therefore be tried for perjury committed during the course of the former trial. He bases his argument on the contention that when the legislature adopted the Health and Safety Code effective September 19, 1939 (Stats. 1939, p. 483), it failed to provide a saving clause covering offenses committed under the former act. In this the appellant is in error. Section 2 of the Health and Safety Code reads as follows: 'The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments.' Section 4 reads as follows: 'Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to the provisions of this code as far as possible.' If this language is insufficient to disclose the legislative intent to effect a mere codification and clarification of the existing statutes without affecting the rights and obligations under those statutes, that legislative intent must be inferred from the fact that in reference to the subject matter here involved the new statute was a mere restatement of the provisions of the former. This subject is fully discussed in the recent opinion of Sobey v. Molony, 40 Cal. App. (2d) 381 (104 Pac. (2d) 868), in which numerous cases are cited. But the

appellant argues that section 4 of the Health and Safety Code is unconstitutional because perchance one might have violated the provisions of the State Narcotic Act prior to the effective date of the codifying act with no proceedings taken against him before that date, and hence the section would discriminate favorably to him and against those in the same position as to whom proceedings had been commenced before that date. We need not discuss this question in its constitutional phases as the section could be disregarded entirely and the same result would follow because of the settled rule that, independent of the saving clause, a person may lawfully be prosecuted under a reenacted or codified statute for a crime committed prior to the date of the codification. (*Sobey v. Molony,* supra.)"

If it may be assumed that the construction placed upon the saving clause by the State court was necessary to support the decision, still no construction has been placed upon it which would exclude from prosecution those who violated section 1-d of the State Narcotic Act prior to its alleged repeal and against whom no accusation had then been filed. In the absence at least of a construction which would hold the person last mentioned immune from prosecution, no federal question is presented. As far as the decision in the instant case is concerned, this Court would be obliged to speculate as to what construction the State court would place upon the saving clause in the event it had before it the question to decide. This Court cannot assume in advance that a construction of the

saving clause would be adopted which would render it obnoxious to the Federal Constitution.

Utah Power and Light Co. v. Pfost, 286 U.S. 165.

However, the point has been raised and decided in California in a case involving a saving clause substantially similar to that here under consideration. In *Sobey v. Molony,* 40 Cal. App. (2nd) 381, a physician was charged with a number of violations of the old Medical Practice Act, which, in line with the plan of the legislature heretofore mentioned was codified and restated in the Business and Professions Code. The offenses were committed prior to the repeal of the Medical Practice Act but no accusation prior to said alleged repeal had been filed against the defendant in that case. Thus we have a case petitioner claims is immune from prosecution under the saving clause here under dispute.

In *Sobey v. Molony,* supra, the State Appellate Court held that the saving clause in the Business and Professions Code saved for prosecution violations against the old Medical Practice Act where no accusation had been filed prior to its repeal. On pages 387 and 388 that Court in this connection said:

> "The effect of respondent's argument is this: He concedes that, if the Business and Professions Code contained no saving clause or clauses at all, he could be prosecuted for offenses committed prior to the adoption of that code; he further must concede that if section 2 were the only saving clause that the Board could lawfully prosecute him; but, according to his view, by enumerating

pending actions and rights accrued in sections 4 and 2002 it must be presumed that the legislature intended to remit all offenses committed prior to August, 1937, where prosecutions had not been instituted prior to that date. In other words, the sole purpose of sections 4 and 2002, according to respondent, was to remit offenses not being prosecuted at the time of the adoption of the new law. This would be to attribute to the legislature the intent of doing by indirection what it easily could have done directly. It is a most peculiar way to remit offenses by a provision specifically saving certain other offenses. Moreover, in attempting to ascertain the legislative intent, it must be kept in mind that statutes regulating the practice of professions and providing for the discipline of offending members, while penal in nature, are also intended to protect the public from unscrupulous, careless or dishonest practitioners. The legislature, we must assume, unless a different intent is clearly expressed to the contrary, did not intend by the codification of the law relating to medical practice, to benefit offending doctors at the expense of the general public. Yet this would be the result if it should be held that by the codification of the law, with the simultaneous repeal of the old law, doctors were placed beyond prosecution for acts constituting grounds for revocation of license both under the former and existing law. Fortunately, neither reason nor authority calls for such a strained construction."

On pages 390 and 391 the Court continues:

"It is our duty in this proceeding to attempt to ascertain and to give effect to the intent of the legislature. In attempting to arrive at that intent

> we are required to give effect, if possible, to all of the provisions of the law. To adopt respondent's construction of the clauses would be to disregard section 2, to treat sections 4 and 2002 as repugnant to section 2, and to hold sections 4 and 2002 controlling as special statutes over the general one. The construction we have adopted gives full effect to both clauses. Moreover, the construction adopted herein is not only a reasonable one, but it also attributes to the legislature a desire and intent to adopt laws in the public interest. We cannot believe that the legislature was so solicitous of doctors who had violated their responsibilities to the public and who had been false to their trust, that it intended to abrogate all prosecutions for offenses committed prior to the codification of the law. It is much more reasonable to assume that no such intent existed."

A petition for a hearing in the Supreme Court was denied.

As previously indicated, the saving clause contained in the Business and Professions Code is similar to that in the Health and Safety Code. The construction, therefore, of the saving clause here in dispute has been settled by the law of this State to include the saving of all offenses against the California Narcotic Act prior to its repeal, whether accusations had been filed or not. Aside from the question as to whether the contention of petitioner, if true, would constitute any discrimination in violation of the equal protection of the laws clause in the Constitution, the case of *Sobey v. Molony* has settled the law on the construction to be placed on the saving clause here under consideration.

Palpably, under these circumstances, there is no violation of the equal protection of the laws clause in the Fourteenth Amendment. Indeed, no federal question is presented. The construction of a local statute is alone involved, which in no manner offends the Constitution.

In *Erie R. R. Co. v. Tompkins,* 304 U.S. 64, at page 78, this Court said:

> "Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. * * *".

See also:

Guaranty Trust Co. v. Blodgett, 287 U.S. 509;
Sutter Buttes Canal Co. v. Railroad Commission, 279 U.S. 145;
Roe v. Kansas, 278 U.S. 191, 193.

(c) THE DECISION OF THE STATE COURT IS SUPPORTABLE BY THE APPLICATION OF THE GENERAL RULE OF CONSTRUCTION INDEPENDENT OF THE SAVING CLAUSE IN THE HEALTH AND SAFETY CODE.

A review of the decision of the State court heretofore quoted will show that it is supportable under

the general rule of construction without resort to the statutory saving clause. The same general rule of construction is recognized in *Sobey v. Molony,* supra, at page 385:

> "* * * It is well-settled that, independently of a saving clause, a person may lawfully be prosecuted, under a repealed and re-enacted statute, for a crime committed prior to the date of the re-enactment. (Lewis' Sutherland Statutory Construction, 2d ed., vol. 1, p. 445, sec. 238; Black on Interpretation of Laws, 2d ed., p. 421, secs. 124, 125; *State v. Gumber,* 37 Wis. 298; *State v. Ware,* 79 Or. 367 (154 Pac. 905, 155 Pac. 364); *State v. Wish,* 15 Neb. 448 (19 N.W. 686); *Bauer v. State,* 99 Neb. 747 (157 N.W. 968); *State v. Brewer,* 22 La. Ann. 273; *Borough of Langhorne Manor v. Clayton,* 129 Pa. Super. 557 (196 Atl. 584); see also, *Board of Dental Examiners v. Lazzell,* 172 Md. 314 (191 Atl. 240).)"

In order to give this Court jurisdiction it must affirmatively appear from the record not only that a federal question was presented but that the decision of the federal question is necessary to the determination of the case.

Honeyman v. Hanan, supra;
Lynch v. New York, 293 U.S. 52.

(f) THE REENACTMENT OF SECTION 1-d OF THE CALIFORNIA NARCOTIC ACT INTO SECTIONS 11225 AND 11226 OF THE HEALTH AND SAFETY CODE WAS WITHOUT SUBSTANTIAL CHANGE AND WAS BUT A RESTATEMENT AND CONTINUATION OF THE CALIFORNIA NARCOTIC ACT.

It is argued that there is no provision in the Health and Safety Code substantially the same as section 1-d

of the California Narcotic Act. It is said a new element is added by the Health and Safety Code—the word "pathology". Bearing in mind the purpose of this narcotic legislation, the difference, if any, is trifling; section 1-d of the Narcotic Act as codified in the Health and Safety Code is substantially the same. The State Appellate Court in its decision so found, which is binding upon this Court under the authorities above cited. Moreover, it is difficult to understand how such a trifling difference, if any, could present to this Court a federal question.

It is submitted that the petition of petitioner presents no federal question giving this Court jurisdiction and that said petition should be denied.

Dated, San Francisco, California,
September 17, 1941.

Respectfully submitted,

EARL WARREN,
Attorney General of the State of California.

DAVID K. LENER,
Deputy Attorney General of the State of California.

Attorneys for Respondent.